SUPREME COURT, U.S.
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No. 02-1574

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL A. NEWDOW, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The government's petition seeks this Court's review of the Ninth Circuit's holding that the inclusion of the phrase "under God" in the national Pledge of Allegiance violates the Establishment Clause when voluntarily recited by public school students.[1] The petition explained that the court of appeals' decision squarely conflicts with two decisions of this Court stating that the Pledge of Allegiance is constitutional (Pet. 14-17), numerous opinions of individual Justices expressing that same view (Pet. 17-19), and the Seventh Circuit's decision in *Sherman* v. *Community Con-*

[1] Since the filing of the government's petition, the citation for the court of appeals' amended opinion on rehearing, and the accompanying opinions on the denial of rehearing en banc, have been altered. They both are now reported at 328 F.3d 466.

solidated School District 21, 980 F.2d 437 (1992), cert. denied, 508 U.S. 950 (1993), which rejected a similar challenge to the Pledge (see Pet. 24). The Petition also explained (Pet. 25) the great importance of the question presented, due to the large number of schools in all 50 States, as well as federally operated schools, that engage in daily voluntary recitations of the Pledge by students, and the overriding importance of having a unitary content for a *national* Pledge of Allegiance. The decision clearly merits this Court's review.

As evidenced by its own petition for a writ of certiorari seeking review and reversal of the same Ninth Circuit judgment, the Elk Grove Unified School District and its superintendent also share the view that an exercise of this Court's certiorari jurisdiction is warranted. See Pet. at i, 20-21, *Elk Grove Unified Sch. Dist.* v. *Newdow*, No. 02-1624 (filed Apr. 30, 2003).

Respondent Newdow now agrees (Br. in Opp. 1) that certiorari should be granted in this case, acknowledging the direct circuit conflict created by the Ninth Circuit's decision and the national importance of the question presented.[2] Newdow, nevertheless, insists that the decision below is wholly consistent with opinions of this Court and of individual Justices, to the point of asserting that there are "no * * * opinions at all" explaining that the Pledge of Allegiance is consistent with the Establishment Clause. Br. in Opp. 1. The reality is otherwise.

In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Court said in no uncertain or qualified terms that "examples

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[2] Respondent Newdow, in fact, has filed his own petition for a writ of certiorari seeking review of the Ninth Circuit's judgment in this case. Pet. at i, 24, *Newdow* v. *United States Congress*, No. 03-7 (filed June 26, 2003).

of reference to our religious heritage are found * * * in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by many thousands of public school children—and adults—every year," *id.* at 676, and that such official acknowledgments of our Nation's religious heritage do not "establish[] a religion or religious faith, or tend[] to do so," *id.* at 678.

Again, in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), the Court specifically reaffirmed *Lynch*'s approval of the reference to God in the Pledge, noting that all the Justices in *Lynch* viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-603.

The Court's analysis of the Pledge and similar official acknowledgments of religion in *Lynch* and *County of Allegheny*, moreover, were not dicta as Newdow asserts (Br. in Opp. 1-2), but instead were components of the "well-established rationale upon which the Court based the results of its * * * decisions." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 66-67 (1996). The Court's discussions of the Pledge articulated the constitutional baseline for permissible official acknowledgments of religion under the Establishment Clause against which the governmental practices at issue in each of those cases were then measured. Indeed, for decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," *id.* at 67, that the Pledge of Allegiance, and similar references, are constitutional. See Pet. 16-19. The opinions of the Court in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), and *Engel* v. *Vitale*, 370 U.S. 421 (1962), repeatedly affirmed the constitutionality of official

references to the Nation's religious heritage and "the many manifestations in our public life of belief in God," *Engel*, 370 U.S. at 435 n.21, that form "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and that acknowledge that "our national life reflects a religious people," *Abington Township*, 374 U.S. at 213.

The Court's cases thus establish as settled law that official acknowledgments in public life of the Nation's religious heritage and character do not constitute a prohibited endorsement of religion and do not otherwise violate the Establishment Clause. "[P]ublic acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government" renders "farfetched" "[a]ny notion that these symbols pose a real danger of establishment of a state church." *Lynch*, 465 U.S. at 686; see also Pet. 14-21 (discussing cases). As pointedly explained by the Court in *County of Allegheny*, the inclusion of the phrase "under God" in the Pledge is one such permissible official acknowledgment of the role of religion in the Nation's culture and history, and it is "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603. The Ninth Circuit's decision is flatly irreconcilable with those opinions.

Newdow counters with a collection of other quotes from Establishment Clause decisions. Br. in Opp. 2-7. The short answer is that the authorities the government's petition cites specifically identify and endorse the Pledge of Allegiance by name. Newdow's excerpts do not. In the Establishment Clause area in particular, where context is crucial, see *Lynch*, 465 U.S. at 678, general reflections pulled out of context from off-point cases do not undermine the force of authoritative statements directed specifically to the question at issue.

Beyond that, Newdow's supposition that his non-specific quotations render the Pledge of Allegiance unconstitutional (Br. in Opp. 2) fails to come to grips with this Court's longstanding refusal to construe the Establishment Clause in a manner that "press[es] the concept of separation of Church and State to * * * extremes" and that thus would condemn as unconstitutional the "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952); see also *Abington Township*, 374 U.S. at 306 (Goldberg, J., concurring) ("untutored devotion to the concept of neutrality can lead to * * * a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."). Indeed, it is precisely because isolated, broad statements of Establishment Clause principles would produce absurd results if applied to their logical extremes in disparate contexts that the Court has used common and unobjectionable practices, like the reference to God in the Pledge of Allegiance, as consistent analytical guideposts in Establishment Clause cases.

In sum, the Establishment Clause has never been held to compel the type of official disregard of or stilted indifference to the Nation's undeniable religious heritage that the Ninth Circuit and respondent propound. The Ninth Circuit's decision is so manifestly contrary to precedent that not only is further review warranted, but the Court may also wish to consider summary reversal.

2. Newdow opposes certiorari on the standing question raised by the government's petition (see Pet. i, 25-30), on the ground that he retains "interests and rights

in directing [his daughter's] education" (Br. in Opp. 8). The question of Newdow's standing to vindicate alleged harm to a daughter over whom he exercises no legal custody, however, is a jurisdictional question that is necessarily antecedent to the Court's consideration of the merits of the constitutional question. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

Amicus Americans United for Separation of Church and State separately argues that the standing question is so infused with questions of state-law as to warrant denial of the petition or certification of some unidentified state-law question to the California Supreme Court. Amicus Br. 7-9.[3] There is no dispute, however, as to the scope of Newdow's rights under state law. Newdow concedes that the child's mother, not he, has "*sole* legal custody" of the daughter. Pet. App. 90a. Nor is there any dispute that the mother's legal custody gives her final decisionmaking control over the "health, education and welfare" of the child. *Id.* at 90a-91a; Cal. Family Code § 3006 (West 1994) ("sole legal custody" means "that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child"). State law is also clear that the mother alone can "direct [the daughter's] activities and make decisions regarding [her] * * * religion." *Burge* v. *City & County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953). In light of Newdow's legal inability to prevent the daughter's exposure

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[3] Amicus's assertion (Br. 11) that Newdow's alleged injury derives "from [his daughter] being coerced to participate in reciting the Pledge" at school misreads the record. See Pet. App. 28a ("Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.").

to religion if the mother decides to take her daughter to church or to enroll her in parochial school, it is unclear how Newdow can nevertheless claim a legally cognizable injury from the daughter's exposure to the Pledge when the mother decides the daughter should attend a public school where it is recited. See generally Pet. 29-30.

While state law affords Newdow the right to "expose" his daughter to his atheistic views, Pet. App. 95a, it is a distinct question of *federal* law whether that limited state-law interest vests him with Article III standing to challenge an educational practice that the custodial mother supports. In amicus's own words (Br. 10), it is the "Ninth Circuit's understanding of the implications of pertinent California law" for Article III standing for which the government's petition seeks this Court's review. Likewise, Newdow's assertion (Br. in Opp. 9) that he should be able to press this suit in federal court, rather than have "to go to the Superior Court to obtain permission" to challenge an educational practice endorsed by the custodial mother, raises precisely the *Rooker-Feldman* concerns identified in the government's petition (Pet. 27). See also *Liedel* v. *Juvenile Ct. of Madison County*, 891 F.2d 1542, 1545-1546 (11th Cir. 1990) (the *Rooker-Feldman* doctrine bars a federal court's exercise of jurisdiction over a case involving an ongoing child custody dispute, notwithstanding claimed violations of constitutional rights to due process and privacy).[4]

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[4] Amicus's separate argument that the federal government is not injured by the Ninth Circuit's ruling (Br. 3-5) is meritless. As explained in the government's petition (Pet. 2 n.2, 11, 25), the *national* Pledge of Allegiance has been declared constitutionally unfit for voluntary recitation in public school classrooms; military schools within the Ninth Circuit would be bound by the judgment

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the court of appeals' judgment.

THEODORE B. OLSON
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to alter their present practice of daily voluntary recitation of the Pledge by students and teachers; and the district court judgment affording the United States a complete victory in its defense of the constitutionality of 4 U.S.C. 4 has now been supplanted by a judgment declaring the law unconstitutional as applied in one important context. Amicus's jurisdictional argument (Br. 5-7) is equally devoid of merit. The United States was made a party-defendant in this litigation, and the Ninth Circuit did not enter a final judgment of dismissal for any of Newdow's claims against the United States. Therefore, unless and until a court dismisses all of Newdow's claims against the United States (as well as the other federal respondents) in their entirety, the United States is entitled to seek review of the court of appeals' adverse judgment. Furthermore, as explained in the United States' petition (Pet. 2), in the unique context of litigation implicating the constitutionality of an Act of Congress, the jurisdictional concerns raised ultimately can have and will have no effect on the United States' status as a party in this case, because the United States government has chosen to make itself a party to defend the constitutionality of federal law on its face and as applied, pursuant to its automatic, statutory right to intervene under 28 U.S.C. 2403. Newdow's broad challenge in his own petition (Pet. at i, 7-23, *Newdow* v. *United Staes Congress*, *supra*) to the Pledge of Allegiance, which names the President and Congress as respondents and which challenges the court of appeals' dismissal of Congress from the case, underscores the federal government's ongoing party status in this litigation.